



John Sharp
Comptroller of Public Accounts
Austin, Texas 78774

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AUG 29 1997

GOVERNMENTAL INQUIRY
UNIT

512/463-4000

LBJ State Office
Building

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July 24, 1997

AUG 05 1997

Opinion Committee

The Honorable Daniel C. Morales
Attorney General
State of Texas
Price Daniel, Sr. Building, 8th Floor
209 West 14th Street
Austin, Texas 78701-1614

FILE # ML-39695-97
I.D. # 39695

Re: *Mark Stennett v. State*
Texas Marihuana and Controlled Substances Tax
Chapter 159, Tax Code

Dear Dan:

I request your opinion on the effect of the above-referenced decision by the Court of Criminal Appeals on the administration of the Texas Marihuana and Controlled Substances Tax, Chapter 159, Tax Code.

As you know, on October 16, 1996, the Texas Court of Criminal Appeals issued its decision in the case of *Mark Stennett v. State*, (Case No. 1013-95). The Court ruled that the imposition of the Texas Marihuana and Controlled Substances Tax can constitute a violation of the Double Jeopardy Clause of the United States Constitution under certain circumstances.

On January 5, 1993, Mr. Stennett was arrested for possession of marihuana. On February 19, 1993, the Comptroller's office assessed Mr. Stennett for the tax due for possession of such a substance under the provisions of Chapter 159, in the amount of \$49,070. Mr. Stennett tendered \$100 on April 5, 1993, to the Comptroller's office on this assessment. Mr. Stennett then argued that his criminal prosecution for possession of marihuana was barred under the Double Jeopardy Clause. The Court ultimately concluded that Mr. Stennett's payment of \$100 for this tax was a "punishment," and his further prosecution for the criminal offense would be violative of the Double Jeopardy Clause.

Both the Harris County District Attorney's Office and the State Prosecuting Attorney filed motions for rehearing in the case, raising a number of important issues that were not resolved by the Court's ruling. Your office filed an *amicus curiae* brief in this matter on behalf of this office, also urging that a rehearing be granted. However, the Court denied the motions for rehearing on April 2, 1997.

The Comptroller's office administers the Marihuana and Controlled Substances Tax Act. The Court of Criminal Appeals' decision in *Stennett* did not declare this tax unconstitutional, and the drug tax statute was not repealed or modified by the Texas Legislature in the recently-concluded session. Therefore, I need your assistance in determining the impact of the Court of Criminal Appeals' ruling on my office's future administration of this tax. In this regard, I have several specific legal questions on which I seek your opinion:

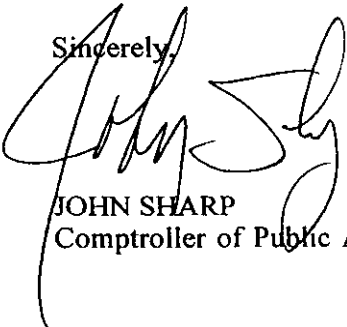
- 1) If the Comptroller's office continues to issue assessments under Chapter 159, will the mere issuance of an assessment of drug tax against an individual by the Comptroller create a violation of the Double Jeopardy Clause of the United States Constitution if that person has also been prosecuted criminally for the same incident?
- 2) If the answer to Question No. 1 is "no," does the answer change if the assessment of tax is coupled with the filing of a State tax lien designed to enhance collection of the tax assessment?
- 3) Is the collection by the state of any amount of money on such a tax assessment (including a nominal partial payment such as that in the *Stennett* case) a form of "punishment," so as to create a potential violation of the Double Jeopardy Clause of the United States Constitution if the person receiving the assessment has been criminally prosecuted?
- 4) If the answer to Question No. 3 is "yes", must the Comptroller accept voluntary payments made by the taxpayer under this Chapter or does the Comptroller have the administrative authority to refuse a tender of payment to avoid a potential violation of the Double Jeopardy Clause?
- 5) Can the withdrawal of a Marihuana and Controlled Substances Tax civil referral under Section 159.206, Tax Code, and the return of any funds tendered under it cure any potential violation of the Double Jeopardy Clause of the United States Constitution?
- 6) Can the Comptroller rely on the Statute of Limitations, Section 111.201 et seq., Tax Code, and refuse to refund any taxes collected under the Marihuana and Controlled Substances Tax Act which are outside of the limitations period even if the collection of such funds constituted a potential violation of the Double Jeopardy Clause of the United States Constitution at the time of collection?

A prompt answer to all of these questions would be appreciated. A number of taxpayers and their attorneys have contacted my office demanding the immediate release of State tax liens or the refund of Marihuana and Controlled Substances taxes already collected, relying on the Court of Criminal Appeals' decision in *Stennett*.

I recognize that the state's highest criminal court has created serious questions about the validity of Chapter 159, but I also recognize that the Court did not declare the tax unconstitutional and am aware of my responsibility to enforce this state's tax laws. I desire to enforce Chapter 159 to the fullest extent possible, but at the same time, I don't want Chapter 159 to serve as a cheap "get out of jail" card used by sinister drug dealers with high-priced criminal defense lawyers. I need your authoritative guidance in determining the prudent course of action.

Thank you for your assistance.

Sincerely,



JOHN SHARP
Comptroller of Public Accounts



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November 18, 1997

John Sharp
Comptroller of Public Accounts
Austin, Texas 78774

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Opinion Committee

The Honorable Daniel C. Morales
Attorney General
State of Texas
Price Daniel, Sr. Building, 8th Floor
209 West 14th Street
Austin, Texas 78701-1614

FILE # RQ-967-DM
I.D. # 39945

Dear Dan:

I request your opinion on whether monies collected by this office in connection with our administration of the Texas Marihuana and Controlled Substances Tax, Chapter 159, Tax Code, must be refunded upon the dismissal of a redetermination hearing or other administrative action, which dismissal occurs at the request of local prosecutors.

As you know, late last year the Texas Court of Criminal Appeals issued its decision in the case of *Stennett v. State*, (Case No. 1013-95). The Court ruled that the imposition of the Texas Marihuana and Controlled Substances Tax can constitute a violation of the Double Jeopardy Clause of the United States Constitution under certain circumstances. In order to protect the integrity of criminal prosecutions and convictions, most prosecutors who have previously referred drug tax cases to us are now formally withdrawing their drug tax referrals, and are requesting that we dismiss our administrative cases and halt further administrative action.

I need your assistance in determining the impact of the prosecutors' requests on administration of the tax. In this regard, I have several specific legal questions on which I seek your opinion:

1. In a small number of drug tax cases pending at this agency, the Comptroller's office has obtained or collected funds to be applied against the drug tax liability assessed against the taxpayer. Typically, these funds were forwarded to us by local law enforcement or obtained by Comptroller's office staff through bank accounts maintained by the taxpayer. If the Comptroller's office receives a request from a prosecutor to dismiss a drug tax assessment against a particular drug taxpayer, including dismissal of any administrative hearing and/or cessation of further administrative action, must this office issue a refund of taxes collected, if any, relating to the drug tax referral?
2. If the answer to Question No. 1 is "yes," does the answer change if the local prosecutor or your office is seeking or intends to seek forfeiture of the money? In other words, if the local prosecutor informs us that he/she is pursuing or intends to pursue forfeiture,

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should the Comptroller's office maintain control over the money while forfeiture action is pending?

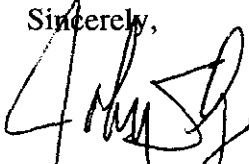
3. If it is determined that forfeiture of the held money will not be pursued, must the Comptroller's office make a refund at that time?

A prompt answer to all of these questions would be appreciated because we have collected money on a limited number of assessments that are now being withdrawn by prosecutors.

I want to enforce Chapter 159 to the fullest extent possible, and I want the other anti-drug laws of this state enforced to the fullest extent possible. While I recognize that refunds of monies collected by this office under Chapter 159 may be required in certain circumstances, I also recognize the responsibility of this office to facilitate the ability of law enforcement officials to effectively perform their duties. I need your authoritative guidance in determining the prudent course of action.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "John Sharp", written over the printed name.

JOHN SHARP
Comptroller of Public Accounts